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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-345

R. J. REYNOLDS TOBACCO COMPANY, ET AL., PETITIONERS

v.

AMERICAN PRESIDENT LINES, LTD., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION

STATEMENT

A petition for a writ of certiorari has been filed by R. J. Reynolds Tobacco Company (Reynolds), RJI Corporation and Sea-Land Service, Inc. (Sea-Land) to review an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 28, 1974. This decision of the Court of Appeals held that the Federal Maritime Commission (Commission) lacked jurisdiction to modify and conditionally approve a charter-merger agreement permitting United States Lines, Inc. (U.S. Lines), a wholly-owned subsidiary of Walter Kidde & Company (Kidde), to be acquired by Reynolds subject to a number of ongoing restrictions. Since the Court of Appeals decision is in conflict with guidelines an-

nounced by this Court in *Federal Maritime Commission* v. *Seatrain Lines, Inc.*,[1] as to the Commission's authority over acquisition transactions involving "ongoing rights and responsibilities," the Commission submits this statement in support of Reynolds' petition and urges that it should be granted.[2]

In October, 1969, the Commission received for approval pursuant to Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814, an agreement providing for Sea-Land's charter for a 20-year period of U.S. Lines' 16 containerships and a 20-year lease of related U.S. Lines equipment. This charter agreement also provided, *inter alia,* Sea-Land with an option to purchase the vessels at the end of the 20-year period. Following an administrative hearing on this charter arrangement, the Hearing Examiner in an initial decision recommended approval, but before the Commission took final action on the Hearing Examiner's decision, the charter agreement was amended by the parties in November, 1970, so as to provide for the merger of U.S. Lines into the Reynolds corporate

[1] 411 U.S. 726 (1973).

[2] In deciding whether or not to petition for a writ of certiorari in its own right, the Commission was unable to reach unanimous agreement. Since its acquisition authority had only recently been given attention by this Court in the *Seatrain* case, the Commission concluded that, unless the parties to the agreement were also intent to litigate this matter further (and when initially contacted they were either uncertain or disinclined to seek a writ of certiorari), the Commission's effort should be directed to amendatory legislation to insure Shipping Act coverage not only over the type of acquisition problems presented by the Reynolds charter-merger, but other types of shipping transactions the Court of Appeals suggested may escape Commission regulation. (Appendix, pp. 16a, 21a and 29a n. 27).

organization. Reynolds would as a result of the merger amendment hold as wholly-owned subsidiaries under its corporate structure Sea-Land and U.S. Lines, two of the largest operators of U.S. flag containerships.

Prior to the Commission's commencement of hearings on the amended agreement, the Department of Justice instituted a civil antitrust action in the district court to enjoin implementation of the merger agreement.[3] In response to motions filed by the Commission in the antitrust action, the court permitted Commission intervention, but finding that the Commission lacked jurisdiction over the charter-merger agreement, refused to dismiss or stay such action on the basis of the Commission's primary jurisdiction. While the court enjoined consummation of the merger, it did not stay proceedings before the Commission on the charter-merger arrangement.

The Commission continued with its hearings on the charter-merger, and at their conclusion, the Administrative Law Judge recommended disapproval of the agreement. The Commission, however, viewed outright rejection of the agreement as "an exercise in negative regulation, a condition totally unacceptable . . . in an age of intermodal transportation modernity" (Appendix, p. 120b) and therefore fashioned modifications and conditions which in its judgment permitted approval of the agreement.

As modified and approved by the Commission, the agreement permitted Kidde's sale of U.S. Lines to

[3] *United States* v. *R.J. Reynolds Tobacco Co.*, 325 F. Supp. 656 (D.N.J. 1971); motion for leave to petition for cert. denied, 410 U.S. 964 (1973).

Reynolds, but prohibited further transfer or encumbrance of the assets or shares of U.S. Lines. The Commission's conditional approval also provided for periodic review by the Commission of the intercorporate relationships and sanctions, including divestiture, for breach of the conditions. Other ongoing conditions made provision for the separate and independent operation of U.S. Lines and continuing Commission scrutiny through public directors and periodic reports. (Appendix, pp. 31a–34a). Thus, while allowing the acquisition, the Commission rejected the original charter provisions in order to preserve the U.S. Lines fleet intact, and conditioned its approval so as to require U.S. Lines to be maintained as a separate, healthy and independent carrier in full competition with Sea-Land.

The Court of Appeals upon review did not regard the conditions imposed on the charter-merger agreement or the Commission's ongoing supervision over the independent operations of U.S. Lines under Reynolds' corporate mantle as determinative factors for Commission jurisdiction, but rather found its task ". . . at an end once we conclude that Congress has not conferred merger jurisdiction on the Commission and that the transaction at issue is in substance a merger." (Appendix, p. 21a).

DISCUSSION

Petitioners herein properly question the correctness of the decision of the Court of Appeals in disregarding the views recently expressed by this Court in *Federal Maritime Commission* v. *Seatrain Lines,*

Inc., concerning Commission jurisdiction over merger or acquisition agreements, or portions thereof, "which created ongoing rights and responsibilities and which, therefore, necessitated continuous Commission supervision." 411 U.S. at 729. The Commission believes that the Petition presents substantial and important questions concerning the breadth and limits of the Commission's Section 15 authority which were not reached by the *Seatrain* decision. If left unresolved, the legal uncertainty of these questions will stimulate continuing challenges to similar types of ongoing arrangements submitted for Commission approval.

1. The lead question the Court is asked to consider by this Petition is whether the Commission, in conditionally approving the charter-merger agreement, followed the mandate in *Seatrain*, where it is stated:

> We conclude that in enacting § 15, Congress did not intend to invest the Commission with the power to shield from antitrust liability merger or acquisition of assets agreements which impose no ongoing responsibilities. Rather, Congress intended to invest the Commission with jurisdiction over only those agreements, or those portions of agreements, which created ongoing rights and responsibilities and which, therefore, necessitated continuous Commission supervision. 411 U.S. at 729.

This language seems clearly to vest the Commission with jurisdiction over merger agreements or parts thereof which additionally create "ongoing rights and responsibilities, and which, therefore, necessitate continuous Commission supervision." However, the Court of Appeals reached a contrary conclusion in stating: "In other words, Section 15 does not apply to merg-

ers, consolidations and acquisitions, either separately *or in conjunction with other agreements.*" (Emphasis added) (Appendix, pp. 17a–18a). Although the lower court's decision later concedes the Commission's "possible jurisdiction" over the remainder of the agreement (Appendix, pp. 20a–21a), it nevertheless ordered the entire agreement removed from the Commission's docket (Appendix, p. 30a).

The decision of the Commission in conditionally approving the charter-merger agreement is entirely consistent with the *Seatrain* teachings. What the Commission cannot regulate, according to *Seatrain,* are mergers or acquisitions that are effectuated by a single, discrete event that imposes "no ongoing responsibilities." The Commission's authority thus does not extend to unconditional, permanent sales or changes of carrier ownership, whether by stock or assets, which would not subject such new ownership to some continuing conditions, liabilities or reversionary interests. However, in approving Reynolds' acquisition of U.S. Lines, the Commission imposed a series of carefully tailored restrictions and conditions to assure the Commission of continued supervision over this acquisition transaction and to preserve U.S. Lines' independence and financial stability.[4] For any breach of such conditions, provision

[4] A factual issue in this case involved the precarious financial condition of U.S. Lines. In striving to fulfill Section 15's purpose in preventing undue reduction of competition by the combination of or cooperation between competing lines, *Seatrain,* 411 U.S. at 738–742, the Commission modified the charter-merger agreement to prevent U.S. Lines' consolidation with Sea-Land either through charter or outright acquisition. By this means the Commission sought to prevent the disappearance of U.S. Lines as an independent and viable competitor in the shipping industry.

was made for, and Reynolds agreed to comply with, a Commission order to divest U.S. Lines. The resulting acquisition transaction, therefore, turned completely on the parties' willingness to be bound by a comprehensive set of ongoing Commission regulations in order to consummate the approved charter-merger.[5]

While the Court in *Seatrain* resolved the question of the Commission's jurisdiction over an acquisition agreement for a single discrete event, this case presents the other side of the coin: an acquisition agreement coupled with ongoing obligations and requiring continuous supervision. The Petition should be granted to afford a complete resolution of the extent of the Commission's Section 15 jurisdiction.

2. Without a definitive resolution by this Court, the Commission and shipping industry are left with no clear demarkation of the Commission's authority to approve, modify and disapprove agreements otherwise subject to Section 15, but which may contain merger or other discrete features. Such clarification now seems particularly essential to enable the Commission to forestall seemingly endless litigation and controversy which will ensue in handling the "myriad of restrictive agreements" submitted for Section 15 approval by shipping conferences, common carriers, terminal operators, forwarders and other persons subject to Shipping Act regulations. It will also assist the Commission in the exercise of its modification powers under Section 15 and public interest guidelines announced by

[5] By memorandum directed to the Commission on March 12, 1973, Reynolds and the other parties agreed to the conditions required by the Commission for the approval of the charter-merger agreement.

the Court in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238.[6]

In the present case for example, the charter agreement as originally submitted was regarded as fully subject to the Commission's jurisdiction,[7] and even before it was amended to provide for the merger, the agreement contemplated the likely demise of U.S. Lines as a viable containership operator. However, such a result could not be condoned or easily justified under the policy standards of either Section 15 or the *Svenska* doctrine. Rejection of the agreement, on the other hand, appeared to chance an equally unacceptable result through the stagnation or liquidation of U.S. Lines. (Appendix, pp. 124b–131b). Under these circumstances, the Commission has understood its statutory obligation as requiring it, wherever possible, to exercise its power of modifying submitted agreements so as to permit their approval. The Commission has in the past rejected the negative course of simply disapproving agreements whose original terms are unacceptable. (Appendix, p. 120b). But if, in fashioning modifications necessary to preserve a balanced competitive posture in the American fleet, the Commission risks overstepping its jurisdictional limits, it may in the future feel constrained to focus its attention more on the jurisdictional rather than

[6] Under the doctrine developed in *Svenska*, the Commission is required to go beyond the agreement's plain terms and weigh the agreement's possible anticompetitive effects against the transportation need, securing important public benefits, and fulfilling a valid regulatory purpose. *Id.* at 243.

[7] Even in this regard, the Court of Appeals has some question about jurisdictional coverage. Appendix, p. 29a n. 27.

the substantive effects of its modifications. Such anomalous situations are inevitable if, as held by the Court of Appeals, "the Commission's jurisdiction must be measured by the agreement actually approved" (Appendix, p. 30a) rather than that which was submitted.

If allowed to stand, the decision by the Court of Appeals clearly places an unwarranted limitation on the Commission's power to modify and approve agreements in the public interest, even though such modifications would bring the agreement within the classes of ongoing agreements that would be subject to Commission jurisdiction under the *Seatrain* doctrine.

CONCLUSION

The Federal Maritime Commission urges that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1974.

I authorize the filing of this memorandum.

ROBERT H. BORK,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE 1974